ORIGINAL

Supreme Court, U.S.
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No. 91-1030

In the
Supreme Court for the United States
October Term, 1991

PAMELA WITHROW,

Petitioner,

v.

ROBERT ALLEN WILLIAMS,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Index of Authorities ii

Counter-Statement of Case 2

Reasons for Denying the Writ 14

1. Respondent Williams has not raised any issues in Federal Court that were not fully and fairly litigated in State Court and in any Event Petitioner's Exhaustion Claim Has Been Waived By Failing to Assert it in the District Court and then Conceding Exhaustion at Oral Arguments Before the Sixth Circuit. 15

2. The Interest of Justice Would Not Be Served By Extending Stone v. Powell to Claimed Violations of Fifth Amendment's Prohibition on Self-Incrimination. Further, Petitioner Waived this Issue By Failing to Argue it to the Lower Court. 22

3. A Confession is Involuntary When Induced by Principles of Leniency and, As No New Rules of Law are Involved, Neither Teague v. Lane, 489 U.S. 288 (1989), 109 S.Ct. 1060, 103 L.Ed.2d 334; or Sawyer v. Smith, 110 S.Ct. 2822 L.Ed.2d (1990), Alter this Principle. 28

Conclusion 37

Proof of Service 38

CASES

In Re Amendment of Platt Sequanmota Heights, 81 Mich. App. 49, 264 N.W.2d 115 (1978) 25

Arizona v. Fulimante, ____ U.S. ____, 111 S. Ct. 1246 (1991) 13

Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612, 48 L.Ed. 2d 368 (1970) 7

Berg v. Morris, 483 F. Supp. 179 (E.D. Cal. 1980) . 26

Blackburn v. Alabama, 361 U.S. 199, 80 S. Ct. 274, 4 L.Ed 2d 242 (1960) 30

Brady v. United States, 397 U.S. 742 (1970) 30, 32

Brams v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 2d 568 (1897) 32

Brewer v. Williams, 430 U.S. 387, 97 S.Ct. 1232, 51 L.Ed.2d 423 (1977) 23

Brown v. State, 132 S.W.2d 15 (Ark. 1939) 35

Cannistaci v. Smith, 470 F. Supp. 586 (S.D.N.Y. 1979) 26

Cardwell v. Taylor, 461 U.S. 571 (1983) 27

Columbe v. Connecticut, 367 U.S. 568, 81 S. Ct. 1860, 6 L.Ed. 2d 1037 (1960) 33

Commonwealth v. Haas, 373 Mass. 545, 369 N.E.2d 692 (1977) 36

DeAngelo v Wainwright, 781 F.2d 1516 (11th Cir. 1986) 24, 27

Escobedo v. Illinois, 378 U.S. 478, 84 S Ct. 1758, 12 L.Ed. 2d 977 (1964) 21

Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977) . . 34, 35

Frishett v. State Farm Mutual Insurance Company, 378 Mich, 733 (1966) 25

Granberry v. Greer, 481 U.S. 129, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987) 18

Hall v. State, 266 N.E.2d 16 (Ind. 1971) 35

Hammer v. Commonwealth, 207 Va. 135, 148 S.E.2d 878 (1966) 35

Harryman v. Estelle, 616 F.2d 870 (5th Cir), cert. denied, 449 U.S. 860, 101 S. Ct. 161, 66 L.Ed. 76 (1980) 23, 26

Jarriel v. State, 317 So.2d 141 (Fla. App. 4th Dist. 1975) 35

Kimmelman v. Morrison, 477 U.S. 365, 106 S Ct. 2574, 91 L.Ed. 2d 305 (1986) 23

Lynmun v. Illinois, 372 U.S. 528, 83 S. Ct. 917, 9 L.Ed 2d 917 (1963) 31, 32

Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989) 27

Malloy v. Hogan, 378 U.S. 1 (1964) 32

Miller v. Fenton, 474 U.S. 104, 105 S. Ct. 445, 882 L. Ed. 2d 405 (1985) 24

Miranda, Berkemer v. McCarty, 468 U.S. 420 (1984) . passim

Miranda v. Arizona, 384 U.S. 436 (1966) . . . . passim

Mitchell v. State, 24 So.2d 312 (Miss. 1898) . . . 33

or Sawyer v. Smith, 110 S.Ct. 2822 . . . . . 28, 36

Oregon v. Elstad, 470 U.S. 298 (1985) 12, 21

Patterson v. Warden, San Louis Obispo, 624 F.2d 69 (9th Cir. 1980) 26

People v. Belanger, 120 Mich. App. 752, 327 N.W.2d 554 (1982) 8

People v. Blackburn, 135 Mich. App. 509 (1984) . . 5, 6

People v. Gallego, 430 Mich. 443, 424 N.W.2d 470 (1988) 32

People v. Hill, 429 Mich. 382, 415 N.W.2d 195 (1987) . 7, 8, 15

People v. M.L. Hill, 152 Mich. App. 374, 393 N.W.2d 642 (1986) 8

People v. Marbury, 151 Mich. App. 159, 390 N.W.2d 659

(1986) 8

People v. Martin, 78 Mich. App. 518, 260 N.W.2d 869 (1977) 7

Picard v. Connor, 404 U.S. 270, 92 S. Ct. 509, 30 L.Ed.2d 438 (1971) 17

Rogers v. Cummings, 154 F. Supp. 663 (D. Conn. 1956) . 30, 31

Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L.Ed.2d 760 (1960) 30, 31

Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 737 (1979) 23

Smith v. Wainwright, 581 F.2d 1149 (5th Cir. 1978) . 26

State v. Shaw, 115 Idaho 461, 767 P.2d 836 (Idaho App. 1989) 33

State v. Thomas, 148 Ariz. 225, 714 P.2d 395 (1986) . 33

Stokes v. State, 289 Md. 155, 423 A.2d 552 (Md. App. 1980) 35

Stone v. Powell, 428 U.S. 465 (1976) . . . . . passim

Strickland v. Washington, 466 U.S. 668, 80 L.Ed.2d 674 (1984) 18

Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) 25, 28, 36

Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990) . . 22

United States ex rel. Sanders v. Rowe, 460 F. Supp. 1128 (N.D. Ill. 1978) 26

United States v. Mast, 735 F.2d 745 (2d Cir. 1984) . 31

Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986) 19

Wainwright v. Sykes, 433 U.S. 72, 97 S. Ct. 2497, 53 L.Ed. 2d 594 (1977) 18

White v. Finkbeiner, 687 F.2d 885 (7th Cir. 1982) . 26, 27

Wilson v. Henderson, 584 F.2d 1185 (2d Cir. 1978), cert. denied, 442 U.S. 945, 99 S. Ct. 2892, 61

L.Ed. 2d 316 (1979) 26

Womack v. State, 281 Ala. 499, 205 So.2d 579 (1967) . 33

STATUTES

28 U.S.C. §2254(d) 10

Mich. Comp. L. §750.316 2

MISCELLANEOUS

Inbau & Reid, Criminal Interrogation and Confession (1962) 35

O'Hara, Fundamentals of Criminal Investigation (1956), (two common police manual's on interrogation techniques) 35

Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence, 87 Mich. L. Rev 907, 925 (1989) . . . 20

COUNTER-STATEMENT OF CASE

Petitioner Pamela Withrow (Warden of Michigan Reformatory) brings this Petition for a Writ of Certiorari following the grant of a writ of habeas corpus by the United States District Court for the Eastern District of Michigan and the unanimous affirmance of this ruling by the United States Court of Appeals for the Sixth Circuit. The underlying state convictions were imposed by the Circuit Court for the County of Wayne, Michigan, for first degree murder (Mich. Comp. L. §750.316), and possession of a firearm during the commission of a felony (Mich. Comp. L. §750.227(b)). These convictions resulted in an ensuing sentence of two years incarceration on the firearms violation followed by a consecutive non-parolable life sentence. This judgment and conviction was affirmed by a divided panel of the Michigan Court of Appeals and discretionary review was denied by a divided (4-3) Michigan Supreme Court.

The facts underlying the Respondent's state prosecution are as follows. On April 6, 1985 the Romulus Police Department discovered Van Robin Hooper and David Charles Stanley shot to death in Hooper's car parked on California Street in Romulus, Michigan (R. 10, TT I. 15).[1] Somewhere between April 6th and April 10th, the police heard rumors that the Respondent may have been involved in the shootings. (R.0, State Suppression Opinion).

---

[1]The background facts regarding the murder are set forth in District Court's Opinion, R.28, p. 4-5.

On April 10, 1986, Romulus Police officers Early and Ondejko went to the Respondent's home. They were admitted into the home by the Respondent's mother. Mr. Williams was sleeping at the time. At the request of the police, Mr. Williams was awakened and came downstairs. At the time, Mr. Williams was in his bed clothes.

Still in bed clothes, Mr. Williams was searched but was not handcuffed and was taken to the police station for questioning. The State presented testimony that Mr. Williams was not arrested, but agreed to come to the station with the police officers. The actual voluntariness of the Respondent's accompaniment is a subject of dispute. At the state evidentiary hearing held, Respondent impeached Sgt. Early with a copy of a police computer printout which stated that Mr. Williams was arrested at his residence. Early acknowledged the printout reported that Mr. Williams was arrested at his home, but stated this was incorrect. (R. O. Evidentiary Hearing Tr. 14).

No Miranda warnings were given when the Respondent arrived at the station and questioning began.[2] The unwarned interrogation began:

> Early: For starters, you've got big problems.
>
> Williams: I do, huh.
>
> Early: Big problems. You got people that are gonna testify that put you with this gun. That are gonna testify that you had it, when you had it, where you had it.

[2]The interrogation sessions were tape recorded. These tapes were made part of the state court record.

> Ondejko: There's gonna be two life sentences here. This ain't no game.
>
> Early: We're about that far right now from getting a warrant for you. You may not have been the shooter. You supplied the gun and know what happened. We think you were probably there and we think we can prove it.
>
> Williams: Nope. I wasn't there.
>
> Early: But the main thing on this is we want the shooter. We're not real interested in who was there or who was along for the ride or anything else. We get the shooter on this and we're pretty well be content.

Session One, Audiotape labeled "Office," (Counter between approximately 028 and 079; Petitioner's App. 47a)

In the middle of the questioning, one officer asked whether he should read the Respondent his rights, but the interrogating officer indicated "not yet." After forty minutes of questioning, Respondent began to implicate himself. Questioning stopped, and Respondent was finally Mirandized. (Trial Court Opinion on Suppression Motion; Confession Tape).[3]

Petitioner was interrogated later on the 10th, and then again on the 11th and 12th. Based on the interrogations, police obtained a search warrant to search the Respondent's home for clothing and

[3]The confession tape was admitted into evidence. (see R. 10, TT I, 67). By stipulation between trial counsel, the tape was not transcribed. In the Court of Appeals, Respondent moved the Court of Appeals to enter an order requiring prosecutor to file the tapes of the confessions with the Court of Appeals as part of the record on appeal. This motion was granted, (Res. App. 1b) and the tape was subsequently filed.

weapons. Clothing was seized from the home. According to Respondent's statement, the gun was thrown into the river; it has not been recovered.

Respondent was charged with two counts of first degree murder, and two counts of felony firearm. A preliminary hearing was held and the Respondent was bound over for trial, over objections as to the sufficiency of the evidence.

On July 5, 1985 Respondent filed a Motion to Suppress the confessions and the evidence seized by the warrant. Respondent contended that: (1) he should have been Mirandized, before being interrogated; (2) That the continued holding of the Respondent without charging or arraigning him was done with the intention of obtaining a statement; and, (3) the clothing was seized pursuant to a search warrant which relied upon the improperly obtained statements. (R.0, State Motion to Suppress).

On September 27, 1985, the Wayne County Circuit Court, per Judge Joseph Sullivan, accepted Argument 2, rejected Argument 1, and did not address Argument 3. In rejecting Respondent's contentions that he was in custody under Miranda, Judge Sullivan found:

> Miranda warnings are not required before questioning unless a defendant is in custody, or is the focus of the investigation. People v. Blackburn, 135 Mich. App. 509 (1984). To determine whether the Defendant was in custody, the court must consider the totality of the circumstances. People v. Blackburn, 135 Mich. App. at 517-518. Here the Defendant agreed to go to the police station for questioning. He was not handcuffed. Detective Sergeant Early testified that he was not under arrest, but was free to come and go;

> Defendant testified that he testified that he believed he was under arrest. When Defendant began to implicate himself, questioning was stopped. He was then given Miranda warnings, and questioning continued after he waived his rights. The Court after hearing testimony of the police officer involved and of the Defendant, and after hearing the taped interview, finds that questioning prior to the warnings was not custodial because Defendant was free to leave at any time. Defendant was not the focus of the investigation until he began to implicate himself.

Respondent waived his right to a trial by jury and instead had his case presented before the Court.[4] At trial, the Respondent's defense was that he did not have the necessary intent to be an aider and abettor, and that he was merely present without criminal intent. (R. 10, TT I, 11-12).

The prosecutor contended that the Respondent was the principal who had actually fired the gun. (R. 10, TT I, 9). At minimum, the prosecutor argued that the Respondent was a knowing aider and abettor, and as such, was just as guilty as a principal. Id.

The Court chose not to settle this conflict and found that there was sufficient evidence to convict under either theory. (R. 11, TT II, 65-67). The Court convicted Respondent of two counts of felony firearm, and two counts of murder in the first degree. The Respondent was sentenced to two counts of natural life imprisonment, and two consecutive terms of two years imprisonment on the felony firearm.

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[4]The transcripts erroneously indicated that this was a jury trial.

Respondent appealed as of right to the Michigan Court of Appeals raising all of the above issues. With respect to the confession issue, the Respondent first urged the Court to reject this Court's rulings in Beckwith v. United States, 425 U.S. 341, 96 S. Ct. 1612, 48 L.Ed. 2d 368 (1970), and hold that a Defendant should be informed of his right to remain silent when subject to non-custodial police interrogation where he was the focus of the police investigation under the Michigan Constitution.[5] Alternatively, the Defendant argued that even under Beckwith, he was in "custody" for purposes of receiving of these rights. (R.0, Respondent's State Court Brief on Appeal).

In the People's Brief on Appeal, the State responded as follows:

> Defendant's first claim of error is that the trial court should have suppressed his confession because he was not given Miranda-warnings after the police investigation had focused upon him as a suspect.
>
> The issue is currently before the Michigan Supreme Court in the case of People v. Hill, Docket No. 78796, which was argued in May, 1987. As the holding in Hill will control the holding in this case, Plaintiff suggests holding the case in abeyance pending the outcome in Hill.
>
> Plaintiff notes, however, that the prevailing sentiment in this Court rejects Defendant's position -- recognizing that since Miranda v. Arizona, 384 U.S. 436 (1966), is a federal case, the federal rule should apply. See, e.g., People v. Martin, 78 Mich. App. 518, 260 N.W.2d 869 (1977); People v. Belanger, 120 Mich. App. 752, 327 N.W.2d 554 (1982); People v. Marbury, 151 Mich. App. 159, 390 N.W.2d 659 (1986); People v. M.L. Hill, 152 Mich. App. 374, 393 N.W.2d 642 (1986). And as the federal rule requires custody "to a degree associated with formal arrest" as a trigger for the application of Miranda, Berkemer v. McCarty, 468 U.S. 420 (1984), and it is clear that Defendant was not under formal arrest at the time he made his statement, it is equally clear that this claim lacks merit.

[5]Defendant-Appellant's Brief, p. 4-18. At the time, this question was pending before the Michigan Supreme Court on leave granted. The Michigan Court of Appeals opinions on the issue were divided.

Id. at 3. On November 17, 1987, the Michigan Supreme Court released its opinion in People v. Hill, 429 Mich. 382, 415 N.W.2d 195 (1987). Hill held that the Michigan Constitution's prohibition against self-incrimination was construed as its federal counterpart. 429 Mich at 393.

On September 7, 1988, the Court of Appeals in a published opinion, (Hood, P.J.; Gillis, and Breighner, J.J.) affirmed the Respondent's conviction in a published opinion, Hood dissenting. The Court of Appeals found that the trial judge had not abused his discretion in finding that the Defendant was in custody for purposes of Miranda warnings:

> Defendant first claims that the trial court erred when it failed to suppress an April 10, 1985 statement he gave to the police. Defendant claims that, because he was the focus of the police investigation or was in custody when he gave the statement, he was entitled to be informed of his rights. Miranda v. Arizona, 384 U.S. 436 (1966). Recently, our Supreme Court rejected the focus test and adopted the custody test. People v. Hill, 429 Mich. 382, 415 N.W.2d 193 (1987). To determine whether the defendant was in custody at the time of the interrogation, the totality of circumstances must be examined. People v. Marbury, 151 Mich. App. 159, 162, 390 N.W.2d 659 (1986). The key question is whether the defendant could have reasonably believed that

> he was not free to leave. Hill, supra 399; Marbury, supra, 162. The trial court's decision regarding the admissibility of a statement will not be reversed unless it is clearly erroneous.

(R. 15, Slip Opinion at 2).

After a remand to the trial court for additional fact finding regarding Respondent's ineffective assistance of counsel issue, the Michigan Supreme Court, on June 10, 1989, denied the Respondent's Petition. However, Justice Levin would grant leave to appeal on the ineffective assistance of counsel issue, Justices Archer and Cavanaugh would grant leave to appeal on both the confession issue which is now before this court as well as the ineffective assistance of counsel claim.

Respondent's pro se Petition for certiorari to this Honorable Court was subsequently denied.

Respondent's next filed a Petition for a Writ of Habeas Corpus in the Eastern District of Michigan, Southern Division. Docket #90-2289, which was granted by the Honorable Barbara Hackett, District Judge. In the Petition, Respondent again challenged the validity of his confession. The Petitioner answered asserting that under the facts of this case, the Police did not have a duty to inform the Defendant of his Miranda rights, because the Respondent was not in custody for Miranda purposes. Judge Hackett rejected this conclusion, after a complete and exhaustive analysis of the state record, she found that a reasonable person would not have felt free to leave the police station. In reaching this fact finding, Judge

Hackett indicated that she was deferring to the state court's finding of operative facts, but rejecting its conclusions of law:

> This Court believes that it must make an independent determination of whether or not Petitioner was in custody during interrogation session one. In making this determination, this Court believes that in the State court's subsidiary findings of fact there is a presumption of correctness. 28 U.S.C. §2254(d). For example, a finding that petitioner was not told he was under arrest, or a finding that petitioner was not told he was free to go, would be a subsidiary finding of fact. However, this Court believes that the overall question of whether Petitioner was in custody is a mixed question of fact and law which requires an independent federal determination. Furthermore, an analysis of the tape recording of session one will reveal, this Court also believes that if arguendo, the custody question is a fact question subject to the §2254(d) presumption of correctness, this particular state court finding is so completely devoid of support in the record that the presumption is overcome. 28 U.S.C. §2254(d)(8).

(R. 28, District Court opinion, 8-9).

Contrary to the Warden Withrow's petition (page 15), the District Court did find that admission of the statements from April 10 was not harmless error. The District Judge stated that it was her opinion that a harmless error analysis did not apply to the statements of April 11 and 12 (District Court Opinion, 27). It was her opinion that a harmless error analysis should be applied to a statement in violation of Miranda. She then proceeded to give a harmless error analysis as to all statements and to state that in any event, the statements were not harmless since no admissible statements existed and the evidence was not overwhelming. Not once

did she suggest that the analysis did not apply to the statements of the 10th.

The Petitioner also refers to a footnote of the District Court opinion. In this footnote, all the judge stated was that the April 10 statement was on two tapes, one of which was labeled a video even though it clearly was not. She also mentioned that there was a videotape of the April 12 statement. It should be noted that all of these tapes were part of the Court file as the District Court based its entire decision on the written record and accompanying exhibits, no additional testimony or exhibits were provided by either side. Furthermore, these tapes were specifically considered by the trial court. The Michigan Court of Appeals specifically granted Mr. Williams' motion to require the Wayne County Prosecutor's Office to file the tapes of his confessions and the transcripts thereof with the Clerk of the Michigan Court of Appeals for consideration.

Following the District Court's adverse ruling, the Respondent Withrow appealed as of right to the United States Court of Appeals for the Sixth Circuit. On appeal, the Appellant was represented by the Michigan Attorney General's Office and the Wayne County Prosecutor's Office. The prosecutor assigned to this appeal was also the prosecutor who represented the People of the State of Michigan in Mr. Williams' state appeal. The prosecutor divided this appeal brief into three issues. He first argued that Mr. Williams failed to raise "any Federal issue all relating to his confession" (Brief on Appeal, p.5) in the Michigan courts and thus

the matter was not properly before the District Court. He then argued that there was no violation of the Fifth Amendment. His third argument was that since Defendant had a full and fair opportunity to raise these claims in state court, federal habeas corpus review should be barred.

The Appellee, Mr. Williams filed his brief in opposition through present counsel. In addition, Mr. Williams' prior state appellate counsel (by leave of the court) filed an amicus brief in which she argued and certified that all issues had been properly federalized.

Oral arguments were held in before the Sixth Circuit Court of Appeals in Cincinnati on May 16, 1991. At that argument the prosecutor conceded that Mr. Williams federalized his confession issue. In the Sixth Circuit opinion upholding the District Court, dated September 11, 1991, the Court included a footnote stating:

> The government's brief argued that federal grounds for relief were never fairly presented to the state court for review. At oral argument, the government conceded that this position was without merit.

The Sixth Circuit further found that District Judge Hackett was correct in determining that the Defendant was legally in custody when he made a statement prior to being given Miranda rights. They also agreed that the statement given after the Miranda rights finally were recited was involuntary. The Court acknowledged that under Oregon v. Elstad, 470 U.S. 298, 309 (1985) the violation of Miranda did not automatically make subsequent statements inadmissible. Instead, as required by Elstad, the Court looked at

the facts of this case to determine whether these later statements were involuntary. The Court found that these statements were involuntary because they coerced by promises of leniency, coupled with threats of immediate imprisonment. The Court found that the Defendant reasonably expected to be released if he talked. The Sixth Circuit found that under Arizona v. Fulimante, ____ U.S. ____, 111 S. Ct. 1246 (1991), this case was subject to a harmless error analysis. However, they found that given the lack of direct evidence and the lack of any admissible statements, the improper admission was not harmless error in this case.

The Court then addressed the issue in Stone v. Powell, 428 U.S. 465 (1976); 96 S.Ct. 3037, 49 L.Ed.2d 1067, stating that the prosecution presented no reasons to extend this issue to confessions, and citing this Court's words in the recent case of Arizona v. Fulminante, supra, that "the ultimate issue of 'voluntariness' is a legal question requiring independent federal determination".

On September 23, 1991 the Appellant filed a timely Petition for Rehearing stating that the Court had misunderstood the concession made at oral arguments. He stated that he had conceded only that Miranda issues were properly raised; not that the issue of voluntariness had been litigated. After consideration of this issue, the Court of Appeals summarily rejected this argument on October 3, 1991 and entered an order to that effect on October 11, 1991. Respondent's Petition for Writ of Certiorari follows.

REASONS FOR DENYING THE WRIT

The issues raised by the Petitioner are not appropriate for review by this Court. All of the Petitioner's issues are either case specific and/or procedurally defaulted. The Petitioner argues primarily that she lost below. She has not argued that any issues of fundamental importance to jurisprudence should be resolved. Further, the Petitioner did not properly preserve any of the issues in front of this Court.

The Petitioner's claim that the Respondent failed to preserve the issue of voluntariness was raised for the first time in the Court of Appeals and was subsequently withdrawn by the prosecutor representing Petitioner at oral arguments. While Petitioner Withrow later disputed the scope of her concession in her Motion for Rehearing, certainly the scope of the Petitioner's oral concession is best left for the judges who heard the concession. In that regard, all three judges of that Court found that the Petitioner had withdrawn the exhaustion claim in toto.

Respondent urges this Court to deny the Petitioner's writ of habeas corpus for the following reasons: (A) the issue of voluntariness was not properly raised below, the scope of the Petitioner's withdrawal of issues at oral arguments before the Sixth Circuit is a question which is committed to the discretion of the judges who heard this concession, and all issues were properly raised in state court by the Respondent; (B) Petitioner waived her argument that Stone v. Powell, supra, should be extended to preclude habeas corpus review of Fifth Amendment violations and

further this extension is not an appropriate one for this court to make; and (C) the statements given were either involuntary or in violation of Miranda.

1. Respondent Williams has not raised any issues in Federal Court that were not fully and fairly litigated in State Court and in any Event Petitioner's Exhaustion Claim Has Been Waived By Failing to Assert it in the District Court and then Conceding Exhaustion at Oral Arguments Before the Sixth Circuit.

Warden Withrow now argues that the voluntariness of the confession under the Constitution of the United States was not properly preserved for review by the Federal Court system. Respondent agrees that issues must be properly preserved, but argues that not only was the issue of the voluntariness of the confession properly preserved by the Respondent at every level; but in addition, that the Petitioner (or the State of Michigan) never raised this issue, in any form, until the decision was made by the Sixth Circuit Court of Appeals. Respondent argues that Petitioner made no distinction between preservation of voluntariness issues and preservation of Miranda issues until the Petition for Rehearing filed in the Sixth Circuit. Thus the prosecution has failed to preserve this issue for review by this Court.

In the United States District Court, the Warden filed a half page argument in answer to Defendant's entire confession issue. In this argument, the prosecution stated, correctly, that Michigan law does not require Miranda warnings for people not in actual custody (citing People v. Hill, 429 Mich. 382, 415 N.W.2d 193

(1987)) and noted that the concept of arrest was well defined. The Petitioner in no way objected to the Federal court's jurisdiction in its pleadings or in its arguments to the Court.

After losing in the District Court, a loss predicated in large part upon the involuntariness of portions of the confession, the Petitioner's argument changed dramatically. On page 5 of his brief to the United States Court of Appeals, the very first page of argument, the prosecutor stated, for the very first time:

> In this case, however, while the District Court proceeded to consider that application of Federal law to Petitioner's situation, the fact is that Petitioner never raised any Federal issue at all relating to his confession in the State appellate courts -- and, in point of fact, specifically limited his claim on appeal to State Constitutional law.

Warden Withrow's Brief to the United States Court of Appeals, Page 5. In this brief, she makes absolutely no distinction between Miranda issues and voluntariness issues, but instead argues the basic issue of federalization.

This entire argument of the prosecution was belied by all of the facts. The briefs through all levels of state court, both those of the defense and the prosecution, argued not only Miranda, but a whole spectrum of other federal cases that relate to the admissibility of confessions. Further, both the trial court and the Michigan Court of Appeal orders specifically cited Miranda. The Michigan Supreme Court denial of leave was a single paragraph that cited no cases, state or federal.

In answer to the Respondent's Petition for Writ of Certiorari to the United States Supreme Court filed by the Defendant from the Michigan Supreme Court order, the prosecution suggested that this case could be used to overrule Miranda, but never even implied that it was improperly before a Federal court.

Upon oral argument in the United States Court of Appeals, the prosecution conceded that there were federal issues ruled on by Judge Hackett were exhausted in Michigan courts. The prosecutor now states that he conceded only that Miranda issues were presented to the state court. (Petition for Writ, Page 20). Although Defendant strongly disagrees that this was the extent of the concession, even the Petitioner's own pleadings indicate that he misstated what took place at the state court level to the Sixth Court of Appeals in his brief on appeal. This was not a incidental error; it was central to the argument of the Respondent and critical to their position.

The distinction between Miranda and voluntariness now proposed by the prosection was raised for the first time in the Petition for Rehearing in front of the United States Court of Appeals. Prior to that Motion, the previously withdrawn issue was argued that Mr. Williams' failed to exhaust any Fifth Amendment challenge. No distinction were made between Miranda and voluntariness issues. In that Petition, this distinction was made for the first time. Since the exhaustion doctrine is a prudential limitation, Picard v. Connor, 404 U.S. 270, 278, 92 S. Ct. 509, 30 L.Ed.2d 438 (1971); the Sixth Circuit did not err in refusing to allow the prosecutor

to withdraw his concession and belatedly split this fine (and Respondent submits non-existent) constitutional hair. Granberry v. Greer, 481 U.S. 129, 131, 107 S.Ct. 1671, 95 L.Ed.2d 119 (1987). Petitioner engaged in a tactical decision before the Sixth Circuit, she should now be required to abide by this decision. As this Court recognized in Granberry:

> We have already decided that the failure to exhaust state remedies does not deprive an appellate court of jurisdiction to consider the merits of a habeas corpus application. See Strickland v. Washington, 466 U.S. 668, 684, 80 L.Ed.2d 674 (1984) . . . . As the Strickland case demonstrates, there are some cases in which it is appropriate for an appellate court to address the merits of a habeas corpus petition notwithstanding the lack of complete exhaustion. Although there is a strong presumption in favor of requiring the prisoner to pursue his available state remedies, his failure to do so is not an absolute bar to appellate consideration of his claim.
>
> We have also expressed our reluctance to adopt rules that allow a party to withhold raising a defense until after the "main event" in this case, the proceeding in the District Court is over. See Wainwright v. Sykes, 433 U.S. 72, 89-90, 97 S. Ct. 2497, 53 L.Ed. 2d 594 (1977). Although the record indicates that the State's failure to raise the nonexhaustion defense was the result of inadvertence, rather than a matter of tactics, it seems unwise to adopt a rule would permit and might even encourage the State to seek a favorable ruling on the merits in the district court while holding the exhaustion defense in reserve for appeal if necessary. If the habeas petition is meritorious, such a rule would prolong the prisoner's confinement for no other reason than the State's postponement of the exhaustion defense for the appellate level.

481 U.S. 132. Here, the Petitioner was aware of the exhaustion issue. While she did not raise it in the District Court, she did

raise it in the Sixth Circuit. At oral arguments, she withdrew the issue. If this is not a tactical decision, what is?

Respondent submits that the Petitioner has conceded the entire issue of federalization. It is basic law, that a party cannot appeal challenging the validity of the position to which he or she consented. See 4 C.J.S. Appeal and Error, §212, p. 617. The Sixth Circuit Court of Appeals heard the concession, they also reviewed the Petition for Rehearing where this was the only issue presented. Their quick rejection of the Petition for Rehearing is a clear indication that they were satisfied the issue had no merit. Clearly, the judges on that panel are in the best position to know what exactly occurred at oral arguments. That they unanimously denied the petition should be recognized by this court. This Court must find that the Sixth Circuit did not abuse its discretion by refusing to allow the Petitioner to withdraw her concession of an issue in a post-opinion Motion for Rehearing.

In addition, the distinction between voluntariness and Miranda the prosecution is now attempting to make is spurious.[6] Although Miranda is perceived as a safeguard against involuntary, uninteiligent, unknowing and coerced waivers, voluntariness is not a separate issue from other 5th amendment claims, since a Miranda error is merely one type of involuntary statement.

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[6]The exhaustion doctrine does not require a federal argument to be the mirror image of the state argument as long as the underlying constitutional claim is the same. Vasquez v. Hillery, 474 U.S. 254, 106 S.Ct. 617, 88 L.Ed.2d 598 (1986)

Contrary to the Petitioner's argument, Miranda resounds in the 5th Amendment, not in some esoteric place of its own. The very first paragraph of that case makes this unequivocally clear. Chief Justice Warren, in the Miranda opinion also stated that, "while the confessions disallowed under Miranda were not exactly the same as those traditionally called involuntary, they were given under a type of compulsion." The use of the word traditionally is significant; under the then new test, these confessions would now be considered involuntary. However, instead of a case by case determination of the voluntariness of confessions, as had previously been the rule, the Court developed a bright line test to assist the courts in making a determination of voluntariness. If the Miranda test was not met the confession would be deemed to be involuntary:

> Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice.

Miranda's absolute rule (unlike that of fourth amendment's exclusionary rule), comes from the fact that a substantial number of confessions occur during custodial interrogation, which is a secret proceeding in which is extraordinarily difficult to determine the exact degree of compulsion involved. Hence, the court created a legitimate constitutional bright line to determine voluntariness. A Lowrey. Police-Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence from Unconstitutionally Used Evidence, 87 Mich. L. Rev 907. 925

(1989). Respondent's invocation of the evidentiary aid of the Miranda presumption of involuntariness from unwarned custodial interrogations by definition encompasses the ultimate voluntariness question on which Miranda is built.

Oregon v. Elstad, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed. 2d 222 (1985), does speak to some confessions that are not violations of Miranda as being involuntary; but it does suggest in any manner that voluntariness and Miranda should not be considered together. Indeed, it is only by looking at the nature of the case, that a court can determine if a statement made subsequent to a Miranda violation is involuntary.

Furthermore, in the instant case, many federal cases that dealt with a broader picture than Miranda violations were brought to the attention of the state courts. This is clear indication that Defendant's argument is based on the 5th Amendment as well as the Miranda case. Defendant's Motion to Suppress Confession/Evidence and for Evidentiary Hearing explicitly said so. Resp. App. 2b. A lengthy quote from Escobedo v. Illinois, 378 U.S. 478, 84 S Ct. 1758, 12 L.Ed. 2d 977 (1964) was presented to the Michigan Court of Appeals (Page 10 of Brief on Appeal). This quote, from a pre-Miranda case, clearly dealt with a Defendant's rights under a voluntariness analysis.

In the Michigan Supreme Court, Respondent cited the case of Bermkemer v. McCarty, 468 U.S. 420, (1984), to define the objectives of Miranda. The quote contained in the state court brief stated:

> " 'The purpose of the safeguards prescribed by Miranda are to ensure that the police do not coerce or trick captive suspects into confessing, to relieve the "inherently compelling pressure" generated by the custodial setting itself, " which work to undermine the individual's will to resist, and as much as possible to free courts from the tasks of scrutinizing individual cases to try to determine, after the fact, whether particular confessions were voluntary." (emphasis added), at page 6-7 of the Application for Leave to Appeal to the Michigan Supreme Court.

Clearly, the distinction that the Petitioner wants to make is an artificial one that would add nothing to jurisprudence and would greatly complicate an already intricate portion of the law. Voluntariness and Miranda are intertwined and Defendant has raised them in every court from trial court to the Court in front of which we now stand.

2. The Interest of Justice Would Not Be Served By Extending Stone v. Powell to Claimed Violations of Fifth Amendment's Prohibition on Self-Incrimination. Further, Petitioner Waived this Issue By Failing to Argue it to the Lower Court.

Petitioner argues that Stone v. Powell, supra, should be extended to bar habeas corpus petitions which challenge the voluntariness of a state criminal defendant's confession.

Waiver:

The first problem with this argument is that it has not been properly preserved for review by this Court. Petitioner's untimely raising of the issue should preclude its application." Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990) (Warden's failure

to argue that Stone v. Powell should be extended to Miranda violations in District Court precluded the warden from raising the issue for the first time on appeal); Harryman v. Estelle, 616 F.2d 870, 872 n.3 (5th Cir) (en banc), cert. denied, 449 U.S. 860, 101 S. Ct. 161, 66 L.Ed. 76 (1980). See also Brewer v. Williams, 430 U.S. 387, 413-414, 97 S.Ct. 1232, 51 L.Ed.2d 423 (1977) (Powell, J. concurring) (Court will not sua sponte consider the extension of Stone where the issue is not raised by the parties).

Even addressing this procedurally defaulted issue on the merits, the Petitioner also must lose. Initially, Respondent would note that this Court has previously declined to extend Stone in Fourth Amendment context. Kimmelman v. Morrison, 477 U.S. 365, 106 S Ct. 2574, 91 L.Ed. 2d 305 (1986) (Stone does not bar a challenge to the effectiveness of a criminal defendant's state counsel where counsel failed to challenge validity of search); Rose v. Mitchell, 443 U.S. 545, 99 S.Ct. 2993, 61 L.Ed.2d 737 (1979) (Stone does not bar racial discrimination claims).

Petitioner argues that a Federal court is in no better position than the state to hear these arguments.[7] However, that is not really true. Michigan has an elected judiciary that must inevitably, as human beings, consider what impact a ruling will

[7]It is interesting to note that Judge Hackett did not disagree with the state court on a point where reasonable minds could differ. She found that even if a presumption of correctness attached to the state court's findings that the Respondent was not in custody for Miranda purposes when he was woke at police request, Terry frisked, taken to the station in bed clothes, fingerprinted, and then taken into an interrogation room and questioned by two police officers, such a ruling was so blatantly incorrect that she could not defer to it.

have on the chance of being elected. The life-time appointments of the federal judiciary free them from the frailties of this consideration.

In addition, this Court clearly considers the voluntariness of confessions to be very appropriate for federal review. In the very recent case of Arizona v. Fulminate, supra, in a decision written by Chief Justice Reinquist, this court stated:

> The question of whether respondent Fulminate's confession was voluntary is one of federal law. "Without exception, the Court's confession cases hold that the ultimate issue of voluntariness is a legal question requiring independent Federal Determination.

See also Miller v. Fenton, 474 U.S. 104, 110, 105 S. Ct. 445, 882 L. Ed. 2d 405 (1985); DeAngelo v Wainwright, 781 F.2d 1516 (11th Cir. 1986) (recognizing that this Court's ruling in Miller v. Fenton implicitly rejected Stone argument).

Faulty Mathematics:

Next, the prosecutor's statement that eleven state court judges and nine court of appeals judges have already decided the issue against defendant is a misleading argument and not a correct characterization of what happened in the state court below.

It is true the trial court and two Michigan Court of Appeals judges did reject Defendant's arguments. However, the third Court of Appeals judge dissented on an issue not in front of this Court and neither accepted nor rejected the majority's opinion on the issue presented in this matter.

In the Michigan Supreme Court, three of the seven justices would have granted leave to appeal. One of these specified that

he would grant leave on an ineffective assistance of counsel issue which is not presented to this Court, but the other two justices simply stated that they would grant leave. Presumably this means on both issues presented to that Court for decision which does include the issue before this Court. Furthermore, the failure to grant leave to appeal is not a decision on the merits. Frishett v. State Farm Mutual Insurance Company, 378 Mich, 733 (1966); In Re Amendment of Platt Sequanmota Heights, 81 Mich. App. 49, 264 N.W.2d 115 (1978).

This Honorable Court denied the application for a writ of certiorari filed immediately after the Michigan Supreme Court denial of leave. However, the Petitioner's argument that this Court implicitly rejected the merits of the Petitioner's argument does not hold water here either. This Court has made it clear that denial of a writ is in no way a reflection on the merits of a case. The Court recently reiterated this principle in a habeas corpus case: "Denial of a writ of certiorari imports no expression of opinion on the merits of case." Teague v. Lane, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

Thus, there are only three judges out of eleven that have actually found the Defendant was not in custody and 4, all of the Federal judges involved, that have found he was.

Stone v. Powell:

Petitioner gives three reasons, providing no support for any, why Stone v. Powell should be extended to confession cases. These are: (1) the burden on the federal system; (2) streamlining

incarceration; and, (3) stop the eroding ability of the government to protect society.

In White v. Finkbeiner, 687 F.2d 885 (7th Cir. 1982), the Seventh Circuit considered the applicability of Stone v. Powell to Miranda issues. That court considered that issues that went to the voluntariness of confessions under the 5th Amendment were clearly cognizable under a request for habeas relief. However, it considered and rejected the idea that a Stone v. Powell analysis might be appropriate to violations of Miranda. The Seventh Circuit cited two grounds for distinguishing Miranda violations from those violations considered in Stone. First, the Miranda rule, unlike the exclusionary rule of Mapp, effectuates a significant policy beyond the deterrence of police misconduct, as it also seeks to uphold the adversarial nature of the criminal justice system.[8] Second, eliminating federal habeas corpus jurisdiction over Miranda claims would not reduce the habeas caseload as nearly every confession issue could be framed in such a manner that the question of voluntariness remained.

Petitioner at least suggests that a Stone v. Powell bar be put in front of all confessions issues, not solely violations of

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[8]For other decisions refusing to extend Stone v. Powell to Miranda claims, see Harryman v. Estelle, 616 F.2d 870 (5th Cir. 1980), cert. denied, 449 U.S. 860, 101 S. Ct. 161, 66 L.Ed. 2d 76 (5th Cir. 1980); Patterson v. Warden, San Louis Obispo, 624 F.2d 69 (9th Cir. 1980) (per curiam); Berg v. Morris, 483 F. Supp. 179, 184 n. 3 (E.D. Cal. 1980); Wilson v. Henderson, 584 F.2d 1185, 1189 (2d Cir. 1978), cert. denied 442 U.S. 945, 99 S. Ct. 2892, 61 L.Ed. 2d 316 (1979); Smith v. Wainwright, 581 F.2d 1149, 1151 (5th Cir. 1978); Cannistaci v. Smith, 470 F. Supp. 586, 590 (S.D.N.Y. 1979); United States ex rel. Sanders v. Rowe, 460 F. Supp. 1128, 1142 (N.D. Ill. 1978).

Miranda. However, there is little doubt that this would interfere with fundamental principles of fairness since the use of involuntary confessions is criticized not only for the methods employed but ultimately goes to the actual reliability of the evidence obtained. Furthermore, in Cardwell v. Taylor, 461 U.S. 571 (1983), this Court specifically stated that while review of a confession as the fruit of an illegal arrest was prohibited by Stone v. Powell, the habeas court remained free to consider whether, "the statements were involuntary, and therefore obtained in violation of the 5th Amendment." Accord. DeAngelo v. Wainwright, 781 F.2d 1516 (11th Cir. 1986) (Stone is not applicable to voluntariness issues). Over and over, and as recently as Fulminante, the courts have stressed the role of the Federal Court in the determination of the voluntariness of confessions.

White v. Finkbeiner, clearly states the flaw in the Warden's argument that extending Stone v. Powell would reduce the burden on Federal courts. Unless extended to all 5th amendment claims, an extension clearly inappropriate for the reasons stated above, it would not reduce the burden on Federal courts, but merely cause the question to be framed in a different manner.

Warden Withrow's second claim does not make any sense. By definition, a person must be incarcerated before they can file a habeas corpus petition, Maleng v. Cook, 490 U.S. 488, 109 S.Ct. 1923, 104 L.Ed.2d 540 (1989). Therefore, the elimination of habeas avenues will not stop the incarceration of any prisoners and will

shorten the incarceration only of those that the courts found to be incarcerated under improper circumstances.

The third claim is that this type of remedy will aid the police in law enforcement. The only way this can be accomplished is if persons who have cognizable claims under Federal law are not allowed to present them to the Court. The elimination of a remedy provided by law to help the police is contrary to the entire principle of justice and fairness. Furthermore, this argument ignores the fact that despite 15 to 20 years of increasingly police oriented case law, the crime rate has not been reduced.

The voluntariness of confessions, whether considered under Miranda or directly under the 5th amendment, go to the fundamental fairness of the proceeding, not merely to the deterrence of police conduct. This Court should not entertain the Petitioner's procedurally defaulted claim that Stone v. Powell should not be extended to these circumstances.

3. A Confession is Involuntary When Induced by Principles of Leniency and, As No New Rules of Law are Involved, Neither Teague v. Lane, 489 U.S. 288 (1989), 109 S.Ct. 1060, 103 L.Ed.2d 334; or Sawyer v. Smith, 110 S.Ct. 2822 L.Ed.2d (1990), Alter this Principle.

As in the first two issues, the Petitioner presents this issue for the first time on appeal. The issue of whether promises of leniency can invalidate a confession was never raised in any fashion in the United State District Court nor in any of the state courts below. In the Court of Appeals, the Petitioner argued that

there were no promises of leniency made by the police, but the prosecution made no argument that "a Confession is not involuntary if induced by promises of leniency." Petitioner's failure to raise this issue below should bar review of this question in this forum.

In any event, the Petitioner's claim is simply without merit. Promises of leniency are clearly sufficient to invalidate confessions in certain circumstances, including the ones present in this case. The Defendant, while in the police station, was told that he would "walk" if he told the truth. He was also told: "you can talk about it now and give us the truth and we're gonna check it out and see if it fits or else we're simply gonna charge you and lock you up." (quoted from App. 48a, Opinion of District Court).

The District Court and Court of Appeals have found that the Respondent was in custody at this time and the prosecution has not challenged that finding in this Honorable Court. Both lower courts also found that Respondent faced with these statements, had a reasonable belief that he would be let go if he talked. They also found that under these circumstances the statements were invalid for both violations of the Miranda bright line rule and traditional voluntariness principles. As to the later, Judge Hackett aptly noted:

> In the context of this uncounselled interrogation, following a session where police had obtained unwarned admissions and repeatedly suggested that they were only interested in finding out who the actual shooter was, this Court finds that the statement that petitioner would "walk" if he told the truth constituted an implied promise

> of leniency sufficient to overcome petitioner's will and render his admissions involuntary. As Justice White indicated in Brady v. United States, 397 U.S. 742 (1970), in such circumstances, even a mild promise of leniency [may be] sufficient to bar the confession not because the promise was an illegal act as such, but because defendants at such times are too sensitive to inducement and the possible impact on them too great to ignore and too difficult to assess

This statement was specifically adopted by the Court of Appeals in this matter as well. App 10a.

Contrary to the assertion of the Petitioner, the decisions of the lower courts are supported by a great many years of case law. It cannot be denied that psychological ploys standing alone are sufficient to render a confession involuntary. In Blackburn v. Alabama, 361 U.S. 199, 206, 80 S. Ct. 274, 279, 4 L.Ed 2d 242 (1960), the this court recognized that:

> A number of cases have demonstrated, if demonstration were needed, that the efficiency of the rack and thumbscrew can be matched given the proper suspect by more sophisticated modes of "persuasion."

In Rogers v. Richmond, 365 U.S. 534, 81 S. Ct. 735, 5 L.Ed.2d 760 (1960), this Court reviewed a Connecticut state confession which was made in response to a police threat to bring in for questioning the Defendant's wife if he did not confess. The state court admitted the confession, holding that the threat did not impair the truthfulness of the confession. The Connecticut Supreme Court affirmed on a similar rationale. The District Court originally granted habeas corpus finding the confession involuntary. Rogers v. Cummings, 154 F. Supp. 663, 665 (D. Conn.

1956). The District Court found that when viewed as a whole, the threat served to overbear the Defendant's will. Id. at 666. This ruling was first overturned on appeal based on the fact that the Federal court should have deferred to the state court's finding of facts. However, when the case ultimately reached the United States Supreme Court, the Court held that the Connecticut Court applied the wrong standard, and that voluntariness should be determined based on the effect it had on the accused, not on whether the results were unreliable. The Supreme Court held that under these facts, a court would have been operating consistent with due process to find the confession involuntary under the Federal Constitution.

Rogers v. Richmond, involved a promise that was kept so that there is no basis or the claim that this would make a difference in the result. Furthermore, in the instant case, Defendant was not let go and no favorable results came from his statement; therefore it can hardly be compared to cases where promises were kept.[9]

In Lynmun v. Illinois, 372 U.S. 528, 83 S. Ct. 917, 9 L.Ed 2d 917 (1963), this Court overturned a state court determination of voluntariness where the police surrounded the suspect in her own home and told her that if she did not confess, her state financial

[9]United States v. Mast, 735 F.2d 745 (2d Cir. 1984), is not to the contrary. First, the Court found that the agent's promises did not cause the Defendant to speak. 735 F.2d at 750 (alternative holding). Secondly, the court specifically relied on the presence of Miranda warnings as a factor against finding involuntariness. Id. Thirdly, Mast was not subject to the rigors of a custodial interrogation at the time.

aid would be cut off and that she would have her children taken away. A unanimous Supreme Court found this statement involuntary:

> It is abundantly clear that the petitioner's oral confession was made only after the police had told her that state financial aid for her infant children would be cut off, and her children taken from her if she did not "cooperate." These threats were made while she was encircled in her apartment by three police officers and a twice convicted felon who had purportedly "set her up." There was no friend or advisor to whom she might turn. She had no previous experience with the criminal law, and had no reason not to believe that the police had ample power to carry out their threats.
>
> We think it clear that a confession made under such circumstances must be deemed not voluntary. That is the teaching of our cases. We have said that the question in each case is whether the defendant's will was overborne at the time he confessed. If so, the confession cannot be deemed "the product of a rational intellect and a free will."

372 U.S. at 534.

In order for a Defendant's confession to be admissible, it must be the product of a free mind and not induced by promises or threats from the interrogators.[10] Brams v. United States, 168 U.S. 532, 18 S.Ct. 183, 42 L.Ed. 2d 568 (1897); Malloy v. Hogan, 378 U.S. 1 (1964); Brady v. United States, 397 U.S. 742C, 90 S. Ct. 1463, 25 L.Ed. 2d 747 (1970). Contrary to the Petitioner's assertions, this is hardly a new theory. Rather, this ruling is a

[10]The Petitioner also attacks Judge Hackett's passing assumption that the police may not have kept their promise to the Respondent. This assumption, however, is not unreasonable in lieu of the fact that the Michigan Supreme Court has explicitly held that the prosecutor's are not required to honor police induced promises. See People v. Gallego, 430 Mich. 443, 424 N.W.2d 470 (1988).

well established principle of American common law and constitutional law. In Columbe v. Connecticut, 367 U.S. 568, 602, 81 S. Ct. 1860, 6 L.Ed. 2d 1037 (1960), Justice Frankfurter recalled:

> The ultimate test remains that which has been the only clearly established test in Anglo-American courts for two hundred years: the test of voluntariness. Is the confession the product of an essentially free and constrained choice by its maker?

The threats and the promises made in this case negate any serious claim that this confession was voluntary. In Womack v. State, 281 Ala. 499, 205 So.2d 579 (1967), the Defendant was also charged with first degree murder. During the course of the defendant's interrogation, the sheriff told the Defendant that "would go lighter" on the Defendant if he confessed. 205 So.2d. at 585. The Alabama Supreme Court found that the confession should not have been admitted because the sheriff's statement was designed to "give a defendant a real hope for lighter punishment." 205 So.2d. at 589. See also State v. Thomas, 148 Ariz. 225, 714 P.2d 395 (1986) (confession was inadmissible where the police officer "did not promise anything" but suggested things would probably go easier on him if he confessed); Mitchell v. State, 24 So.2d 312 (Miss. 1898) (telling suspect "that it is best to tell the truth" was an implied promise of leniency under circumstances). Sgt. Early's promise to Mr. Williams that he "would walk" certainly rises to this level.

Similarly, many courts around this country have found a plea involuntary when based on an implied promise not to prosecute a third party. In State v. Shaw, 115 Idaho 461, 767 P.2d 836 (Idaho

App. 1989), the Court found the Defendant confession invalid where the interrogating prosecutor took a confession where the Defendant's mother had also been arrested for the crime and where the Defendant was pleading for leniency for her. Despite the fact that the prosecutor skillfully avoided promising leniency, he did tell the Defendant that it "was time to talk." After an emotional plea for leniency, the Defendant confessed. The Defendant's mother was released on her own recognizance after the statement.

The Idaho Appellate Court found other these circumstances the confession should not have been admitted:

> The cumulative impact of Davis's pending release from prison, Shirley Davis's coincidental incarceration, the timing of Davis's interrogations, the subtle references to Shirley Davis's plight during those interrogations and the fact that Shirley Davis was released shortly after her son's confession, manifest coercive--although discreet--behavior on the part of the investigating officers.

767 P.2d. at 840.

The Fourth Circuit reached a similar conclusion in Ferguson v. Boyd, 566 F.2d 873 (4th Cir. 1977) (en banc). There, the Petitioner was arrested for the breaking and entering of a gun store. Petitioner invoked his right to counsel and refused to speak with the police or the prosecutor. Petitioner, however, told the police that he would confess if they let his girl friend go. (She had been arrested in the car where the stolen guns were being carried to). Ultimately, the prosecutor either agreed or told the Defendant that he would consider it. Although, there was a factual dispute on this point, and the Fourth Circuit felt that it did not

need to be resolved. Rather, the Court found that the statement should be judged from the point of view of a reasonable suspect. The Court found that it would not have been unreasonable for the Petitioner to have viewed this as a promise that girl friend would be set free. 566 F.2d at 876. Viewing matters as a whole, the Court found the confession involuntary. Id. at 878. See also Stokes v. State, 289 Md. 155, 423 A.2d 552 (Md. App. 1980) (promise to not charge Defendant's wife rendered Defendant's statement and resulting evidence inadmissible); Jarriel v. State, 317 So.2d 141 (Fla. App. 4th Dist. 1975) (invalidating confession because the Defendant was told that his wife would be charged if he did not confess); Hall v. State, 266 N.E.2d 16 (Ind. 1971) (promise not to charge the Defendant's wife made confession inadmissible); Hammer v. Commonwealth, 207 Va. 135, 148 S.E.2d 878 (1966); Brown v. State, 132 S.W.2d 15 (Ark. 1939) (invalidating a confession in part because of implied promise not to prosecute the Defendant's wife).

Additionally, the interrogation took place in the police station without relatives or counsel present is another factor to be considered in determining the voluntariness of the confession. In Miranda v Arizona, 384 US 436, 86 S Ct 1602, 16 L.Ed. 2d 694 (1966), Justice Warren, quoting with Inbau & Reid, Criminal Interrogation and Confession (1962) and O'Hara, Fundamentals of Criminal Investigation (1956), (two common police manual's on interrogation techniques), noted the coercive effect that was gained by removing the Defendant from the home, under ordinary circumstances:

> "The officers are told by the manuals that the 'principal psychological factor contributing to successful interrogation is privacy -- being alone with the person under interrogation.' The efficacy of this tactic has been explained as follows:
>
> > 'If at all practicable, the interrogation should take place in the investigator's office or at least in a room of his own choice. The subject should be deprived of every psychological advantage. In his own home he may be confident, indignant, or recalcitrant. He is more keenly aware of his rights and more reluctant to tell of his indiscretions or criminal behavior within the walls of his home. Moreover, his family and other friends are nearby, their presence lending moral support. In his own office, the investigator possesses all the advantages. The atmosphere suggest the invincibility of the forces of the law.'

See also Commonwealth v. Haas, 373 Mass. 545, 552-553, 369 N.E.2d 692 (1977) (A "station house atmosphere is generally most conducive to successful interrogation because the investigator 'possesses all the advantages'"). In this case, the Defendant was seized from his home in the middle of the night in bed clothes and transported to the police station for an incommunicado detention, and was not even given the benefit of a statement of his rights. These factors further compound the voluntariness issue.

Finally, the Petitioner cites Teague v. Lane, supra, and Sawyer v. Smith, supra, for the principle that collateral review is not an appropriate forum for new rules of law. While that is clearly the holding of these cases, it bears no relationship to the case at issue. As the many state and federal cases cited above

make clear, there is no new rule of law even suggested, only the very old one that promises of leniency make a confession invalid. The lower courts in this case were correct that the statements made were involuntary and their decisions should be affirmed.

CONCLUSION

This case does not involve questions of national significance. The underlying ruling of the Sixth Circuit is sound and fully in line with established constitutional precedents. The Petitioner's proposed expansions of constitutional and habeas corpus law were not presented to the District Court or the Sixth Circuit. This Court should find these claims procedurally defaulted and decline to review this case.

WHEREFORE RESPONDENT prays that this Court DENY the Petitioner's Petition and allow the decision of the United States Court of Appeals for the Sixth Circuit to stand.

Respectfully submitted,

JAMES C. THOMAS, P.C.

BY: _____

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Attorney for Respondent

No. 91-1030
In the
Supreme Court for the United States
October Term, 1991

PAMELA WITHROW,

Petitioner,

v.

ROBERT ALLEN WILLIAMS,

Respondent.

PROOF OF SERVICE

BONNIE TESSIER says that on the 18th day of March, 1992, she served a copy of Motion for Leave to Proceed in Forma Pauperis, and Respondent's Brief in Opposition to Petition to Writ of Certiorari upon

Jeffrey Caminsky, Assistant Prosecuting Attorney, 12th Floor, 1441 St. Antoine, Detroit, MI 48226

by mailing the same to him in a sealed envelope, properly addressed, with postage fully prepaid thereon, and by depositing the same in the United States Mail at Detroit, Michigan.

_____
Bonnie Tessier

Subscribed and sworn to before me
this 18th day of March, 1992

_____
Sheryl Filauro
Notary Public, Macomb County, MI
(Acting in Wayne County)

My Commission Expires: April 4, 1995

BEST AVAILABLE COPY

AT A SESSION OF THE COURT OF APPEALS OF THE STATE OF MICHIGAN, Held at the Court of Appeals in the City of Detroit, on the 28th day of October in the year of our Lord one thousand nine hundred and eighty-seven

Present the Honorable
Richard M. Maher
Presiding Judge
Myron H. Wahls
Joseph B. Sullivan
Judges

Docket No. 97724
L.C. No. 85-567271

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

ROBERT ALLEN WILLIAMS,

Defendant-Appellant.

In this cause a motion to compel filing of exhibits is filed by defendant-appellant, and no answer in opposition thereto having been filed, and due consideration thereof having been had by the Court,

IT IS ORDERED that the motion to compel filing of exhibits be, and the same is hereby GRANTED.

IT IS FURTHER ORDERED that plaintiff-appellee file a copy of the taped confession with the Clerk of the Wayne County Circuit Court forthwith for purposes of transmitting same to this Court and that plaintiff-appellee furnish written notice to defendant-appellant of this filing.

STATE OF MICHIGAN--ss.

I, Ronald L. Dzierbicki, Clerk of the Court of Appeals of the State of Michigan, do hereby certify that the foregoing is a true and correct copy of an order entered in said court in said cause; that I have compared the same with the original, and that it is a true transcript therefrom, and the whole of said original order.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said Court of Appeals at Lansing, this 3rd day of November in the year of our Lord one thousand nine hundred and eighty-seven.

Chief Clerk

Respondent's Exhibit 1

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

667,321,450

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff,

-vs-

Case No. 85-567271

ROBERT ALLEN WILLIAMS,
Defendant.

MARTIN B. MARCUS, P-34234
Attorney for Defendant

JUL 03 1985

MOTION TO SUPPRESS CONFESSION/EVIDENCE AND FOR EVIDENTIARY HEARING

NOW COMES Defendant herein, ROBERT ALLEN WILLIAMS, by and through his attorney, MARTIN B. MARCUS, and says unto this Honorable Court as follows:

1. That the Defendant is currently charged with two counts of Murder I, and two counts of Felony Firearm; contrary to MCLA 750.316 and 750.227(b).

2. That the Defendant was arrested on the above charges on April 10, 1985, at his residence and without a warrant, by the Romulus police.

3. That on April 10, 1985, the Defendant was questioned and made statements to the Romulus police concerning his involement in the above charges.

4. That on April 11, 1985, the Defendant was given a polygraph exam by the Michigan State Police, and made statements concerning his involvement in the above charges.

5. That on April 12, 1985, the Defendant was again questioned by the Romulus police, and the Defendant made statements concerning his involvement in the above charges. This conversation was taped and transcribed, and a copy is provided with this Motion to the Court.

6. That based on information provided by the Defendant, a search warrant was issued for Defendant's residence; and pursuant thereto, certain items of clothing were recovered.

7. That at the time of Defendant's arrest, the arresting officers did not have probable cause to arrest the Defendant.

8. That the above statements of the Defendant were involuntary in nature and were taken in violation of Defendant's rights under the 4th, 5th and 6th Amend. of the U.S. Constitution, and the corresponding sections of the Michigan Constitution.

9. That an evidentiary hearing is necessary in order to determine the circumstances under which the aforementioned confession/evidence was obtained and in order to determine whether the evidence in question should be suppressed.

Respondent's Exhibit 2

NO. 91-1030

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAMELA WITHROW,

Petitioner,

v.

ROBERT ALLEN WILLIAMS, JR.

Respondent.

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE)ss

The undersigned deponent, being duly sworn, deposes and says that she served a true copy of: **PETITION FOR WRIT OF CERTIORARI**

upon: Robert A. Williams (Pro Per)

the within named Petitioner in pro per, and Attorney General's Office by depositing said pleading in the U.S. Mail, in the City of Detroit, enclosed in an envelope bearing postage fully prepaid on December 10, 1991, plainly addressed as follows:

Robert A. Williams
#137866
P.O. Box 500
Ionia, Michigan 48846

James L. Stropkai
Office of Attorney General
720 Law Building, 535 W. Ottawa
Lansing, Michigan 48913

Joycelyn Hammons
JOYCELYN HAMMONS

And said pleading was filed in the Supreme Court of the United States by DEPOSITING IN THE U.S. MAIL on December 12, 1991 addressed as follows:

JOSEPH F. SPANIOL, JR., CLERK
Supreme Court of the United States
Office of the Clerk
Washington, D.C. 20543

Timothy A. Baughman
TIMOTHY A. BAUGHMAN

Subscribed and sworn to before me
this 10th day of December, 1991.

Joyce Nelson DeVoll
Joyce Nelson DeVoll
Notary Public, Wayne County, Michigan
My commission expires: 9/7/93

RECEIVED
DEC 12 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

SUPREME COURT OF THE UNITED STATES

PAMELA WITHROW,

Petitioner, No. 91-1030

vs.

ROBERT ALLEN WILLIAMS, JR.,

Respondent.
/

CERTIFICATE OF SERVICE

BONNIE TESSIER says that on the 16th day of January, 1992, she served a copy of Notice of Appearance upon: Timothy A. Baughman, 1441 St. Antoine, Detroit, Michigan 48226 by mailing the same to him in a sealed envelope, properly addressed, with postage fully prepaid thereon; and by depositing the same in the United States Mail at Detroit, Michigan.

Bonnie Tessier
Bonnie Tessier

Subscribed and sworn to before me
this 16th day of January, 1992

Sheryl Filauro
Sheryl Filauro
Notary Public, Macomb County, MI
(Acting in Wayne County)

My Commission Expires: April 4, 1995

SUPREME COURT OF THE UNITED STATES

PAMELA WITHROW,

Petitioner,

vs.

ROBERT ALLEN WILLIAMS, JR.,

Respondent.

No. 91-1030

RECEIVED
JAN 23 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

NOTICE OF APPEARANCE

NOW COMES James C. Thomas, P.C., pursuant to Rule 9 of the United States Supreme Court and hereby files his Notice of Appearance as Counsel for Respondent, Robert Allen Williams, Jr.

Respectfully submitted,

JAMES C. THOMAS (P23801)
Attorney for Defendant
2632 Buhl Building
Detroit, MI 48226
(313) 963-2420

Dated: January 16, 1992